YATES PETROLEUM CORP.

IBLA 77-387; IBLA 77-435 Decided February 8, 1978

Appeals from decisions of New Mexico State Office, Bureau of Land Management, determining that oil and gas leases NM 326, NM 1524, and NM 26439 had expired and were not subject to 2-year extension by drilling over.

Affirmed.

1. Oil and Gas Leases: Extensions

   For a noncompetitive oil and gas lease issued subsequent to September 2, 1960, to be entitled to a 2-year extension for drilling over, actual drilling operations must be commenced on the leasehold, or for the benefit of the leasehold under an approved cooperative or unit plan of development, prior to the end of the primary term of 10 years, and be diligently prosecuted at that time.

2. Oil and Gas Leases: Extensions

   Where the term of a noncompetitive oil and gas lease issued subsequent to September 2, 1960, has been extended beyond its 10-year primary term, and actual drilling operations are being conducted on the terminal date, there is no entitlement to a 2-year extension for drilling over unless the drilling operations were commenced prior to the end of the 10-year primary term and had been diligently prosecuted thereafter. It makes no difference whether the extension beyond the 10-year primary term was given because of segregation in accordance with 43 CFR 3107.4-3 (partial commitment of lease to an

approved unit agreement), or because of elimination of lease from an approved unit agreement under 43 CFR 3017.5.

3. Estoppel--Regulations: Applicability

There is no estoppel applicable to the Department of the Interior where it has changed a clearly erroneous regulation to comport with an amendment to the oil and gas leasing laws enacted some 15 years previously. The Department is not precluded from correcting that which is "clearly erroneous."

APPEARANCES: A. J. Losee, Esq., Losee & Carson, P.A., Artesia, New Mexico, for appellant.

OPINION BY ADMINISTRATIVE JUDGE HENRIQUES

Yates Petroleum Corp. has appealed from determinations by New Mexico State Office, Bureau of Land Management (BLM), that noncompetitive oil and gas leases NM 326, NM 1524, and NM 26439 each had expired at the end of its extended lease term, and since none of the leases was in its primary term at the expiration date, none is entitled to a 2-year drilling extension under the present oil and gas leasing regulations. The terminal date for NM 26439 was April 29, 1977, for NM 326 and NM 1524, May 29, 1977.

Record data is as follows:

NM 326 was issued effective September 1, 1966, for lands in secs. 7, 8, and 9, T. 23 S., R. 23 E., New Mexico principal meridian. Effective April 29, 1975, the lands in secs. 8 and 9 were committed to the Tippin Ranch Unit Agreement, 14-08-0001-14264, and the land in sec. 7 was segregated into lease NM 26439, which was extended to April 29, 1977. 43 CFR 3107.4-3. Tippin Ranch Unit Agreement was terminated May 29, 1975, so that lease NM 326 was extended to May 29, 1977. 43 CFR 3107.5. Record title to both NM 326 and NM 26439 is in Yates Petroleum Corp., following mesne assignments.

NM 1524 was issued effective March 1, 1967, for lands in secs. 4 and 5, T. 23 S., R. 23 E. It was committed to Tippin Ranch Unit Agreement April 29, 1975, and eliminated from the unit on May 29, 1975, so that its lease term was likewise extended to May 29, 1977. Record title is vested one-half in Yates Petroleum Corp., one-sixth each in Yates Drilling Co., Abo Petroleum Corp., and Myco Industries, Inc.

On the end of the 10-year term of each lease there were no actual drilling operations in progress on any lease. However, on the stated expiration date for each lease, there were actual drilling operations in progress, with each well stated to be for an intended depth of 10,000 feet to test the Morrow formation.

There is no dispute as to these record facts. The question presented is whether the lessee is entitled to a 2-year extension by the actual drilling operations being conducted on the leasehold on the terminal date of the extended lease term (hereafter "terminal date"), none of the leases ever having been extended by reason of production of oil and gas in paying quantities. 43 CFR 3107.2-3. Resolution of this question requires construction of the definition of "primary term," and how the definition should be applied to the subject leases.

Appellant contends that the regulations in effect when the leases were originally issued should prevail, especially as it had been the practice of BLM until March 31, 1975, to grant 2-year drilling extensions to any lease if actual drilling operations were in progress on the terminal date of the lease, where there had not been any extension of the lease term for reason of production.

When leases NM 326 and NM 1524 were issued (September 1966, March 1967), the governing regulation for drilling extensions was 43 CFR 3127.2, which provided:

> § 3127.2 Continuation of lease as a result of actual drilling operations.
>
> (a) Any lease on which actual drilling operations, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time, shall be extended for 2 years and so long thereafter as oil or gas is produced in paying quantities.
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> (b) Actual drilling operations must be conducted in such a way as to be an effort which one seriously looking for oil or gas could be expected to make in that particular area, given existing knowledge of geologic and other pertinent facts.
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> (c) As used in this section (1) "actual drilling operations" shall include not only the physical drilling of a well but the testing, completing or equipping of such well for the production of oil or gas; (2) "primary term" means all periods in the life of the lease prior to its extension by reason of production of oil or gas in paying quantities.
> [31 F.R. 7806, June 2, 1966]

Following redesignation published June 13, 1970, at 35 FR 9502, the 2-year drilling extension regulation became 43 CFR 3107.2.

The statute on which this regulation is predicated was enacted as part of section 2 of the Mineral Leasing Act Revision of 1960, P.L. 86-705, 74 Stat. 781, September 2, 1960, which reads in pertinent part:

> (e) Competitive leases issued under this section shall be for a primary term of five years and noncompetitive leases for a primary term of ten years. Each such lease shall continue so long after its primary term as oil or gas is produced in paying quantities. Any lease issued under this section for land on which, or for which under an approved cooperative or unit plan of development or operation, actual drilling operations were commenced prior to the end of its primary term and are being diligently prosecuted at that time shall be extended for two years and so long thereafter as oil or gas is produced in paying quantities.

It is thus obvious that the definition of "primary term" in the regulation does not comport with the language of the statute. In order to clarify the definition of "primary term," which in 43 CFR 3107.2-1(b)(i) is applicable only to leases issued prior to September 2, 1960, 30 U.S.C. § 226-1(d) (1970), a new definition effective March 31, 1975, was promulgated at 40 FR 12507 (March 19, 1975) to apply to leases issued subsequently to September 2, 1960, under the authority of 30 U.S.C. § 226, and to comport particularly with the language in 30 U.S.C. § 226(e).

> § 3107.2-1 Terms defined.
>
> (b) Primary term. * * *
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> (2) "Primary term" of all other leases means the initial term as set forth in the lease. For a competitive lease issued under section 17 of the Mineral Leasing Act, as amended (30 U.S.C. § 226(e)), this means five years, and for a noncompetitive lease issued under that section this means ten years. [35 FR 9686, June 13, 1970, as amended at 40 FR 12507, Mar. 19, 1975]

Appellant cites Enfield, et al. v. Frizzell, Acting Secretary of the Interior, No. 75-260M (D.N.M. March 24, 1976), as support for their position. In that case, the plaintiffs sought review of the Departmental regulation, 43 CFR 3107.2-1(b), as amended effective March 31, 1975. The contested issues of law are whether the same meaning and interpretation must be ascribed to post-1960 leases subject to section 17e, 30 U.S.C. § 226(e) as is ascribed to pre-1960 leases issued subject to section 4(d), 30 U.S.C. § 226-1(d), as the

same relate to drilling extensions; whether the regulation is contrary to law and a uniform interpretation of the two sections and void as being in excess of the authority of the Secretary and constituting an abuse of existing discretion; whether the proposed regulation can amend post-1960 leases issued before March 31, 1975; and whether the regulation constitutes a change of the basic terms of the leases issued before March 15, 1975. Judge Mecham held that the Secretary can amend his regulations so as to comply with the language of the statute applicable to post-1960 leases, but the Secretary exceeded his authority in applying the language of the March 31, 1975, amendment to post-1960 leases existing at that time, and the challenged regulation should not be given retroactive effect as applied to those leases which were in existence before the effective date of the regulation.

The Government, however, appealed from Judge Mecham's ruling, and in Enfield, et al. v. Kleppe, Secretary of the Interior, No. 76-1737 (10th Cir., Dec. 16, 1977), the Court of Appeals reversed the District Court, holding that in a conflict between statute and regulation, the regulation in conflict is void and unenforceable, and that where the regulation is thus ineffective, there is no retroactivity problem; that the length of time a faulty regulation is on the books is of no consequence because an administrative provision contrary to statute must be overturned, "no matter how well settled and how long standing," and finally that the argument of plaintiff that it had relied to its detriment upon the regulation was without merit because the defective regulation was never valid so there was no right to rely on it.

[1] It is thus abundantly clear that a noncompetitive oil and gas lease issued subsequent to September 2, 1960, 30 U.S.C. § 226(e), has a primary term of 10 years and that if the lessee is to obtain an extension by drilling over, he must be conducting actual drilling operations at the conclusion of the 10-year primary term, notwithstanding the fact that the actual lease term might otherwise have been extended beyond the end of the initial 10-year primary term.

[2] In the cases at bar, each lease had been extended beyond the primary term of 10 years by reason of commitment to and elimination from an approved unit agreement, but there had been no drilling operations on any of these leases at the end of the 10th lease year. As shown above, the actual drilling operations being conducted on the leaseholds on the last day of the extended term did not serve to make the leases eligible for an extension of an additional 2 years. The interpretation expressed by BLM in its letters to appellant relative to the expiration dates of leases NM 326, NM 1524, and NM 26439, is correct.

[3] The Government is not estopped from applying a change in regulation, effected to comport with the governing statute, against prior oil and gas leases issued pursuant to the statute. The length of time that the faulty regulation was on the books is of no consequence because an administrative provision contrary to statute must be overturned "no matter how well settled and how long standing." Wilderness Society v. Morton, 479 F.2d 842, 865 (D.C. Cir.), cert. denied, 411 U.S. 917 (1973); McDade v. Morton, 353 F. Supp. 1006, 1012 (D.D.C. 1973), aff'd without opinion, 494 F.2d 1156 (D.C. Cir. 1974). The latter case dealt with the same statute that is here present. It was ruled that there was no estoppel applicable to an administrative agency as a result of a former interpretation of a statute which had continued for 46 years; that the administrative agency was not precluded from correcting that which is "clearly erroneous." Enfield, supra. Furthermore, we note that the effective date of such regulation, defining "primary term," was more than a year and 5 months prior to the end of the primary term of the oil and gas leases at issue, so that the lessee must be held chargeable with knowledge of such regulation and he may not be heard to claim the Government is applying a regulation retroactively to his detriment.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the actions by BLM are affirmed and the leases are declared terminated.

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Douglas E. Henriques
Administrative Judge

We concur:

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Martin Ritvo
Administrative Judge

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Joan B. Thompson
Administrative Judge